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ABSTRACT

This curriculum unit introduces students to the relationship between the federal government and American Indians through five narrative descriptions of the related legislation, laws, and court interpretations. The narratives cover: (1) the historical basis of federal Indian law and the government-to-government relationship; (2) legal definitions of Indian Country, Indian tribes, and individual Indian identity; (3) tribal sovereignty, powers of tribal governments, and federal limitations of tribal powers; (4) federal-Indian treaties, treaty effects on Indian rights, and Supreme Court interpretations; and (5) recent federal Indian laws, including the Indian Civil Rights Act, the Tribal Education Act, the Indian Self-Determination and Education Assistance Act, and the Indian Child Welfare Act. The narratives are accompanied by student worksheets. This document also contains guidelines for instruction, teacher references, a list of tribal contacts in Wisconsin, definitions of key concepts, and suggestions for classroom group or individual projects. (SV)

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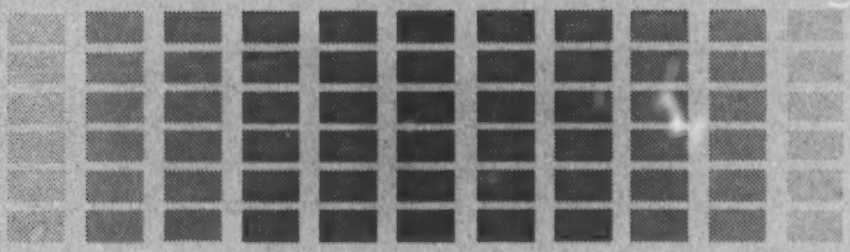

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Current Federal Indian Law

and its Precedents

Wisconsin Woodland Indian Dissemination Project

Susan Dion

1990

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Current Federal Indian Law and Its Precedents

Teacher Information Sheet

Guidelines for Instruction

The unit you are about to review and introduce to your students addresses the topic of "Current Federal Indian Law and Its Precedents." Unfortunately, some of the legal concepts covered in this unit are highly complex, while others remain unclear and are the cause of much debate. There is always a certain amount of ambiguity present in court interpretations, legislative acts, and executive pronouncements. Because of this ambiguity, students may have a difficult time grasping the major themes of federal Indian law. Students may also lack a solid understanding of American government and political processes. This information needs to be clarified in basic ways by the teacher as the students proceed with the material.

The teacher needs to take an active role in presenting the material on federal Indian law. Students will need time to ask questions, to deal with the "gray" areas, to recognize opposing points of view, and to comprehend some theories and facts of law that may seem very unusual and new to them. The acute sensitivity of the teacher to the issues presented is a key to the success of the unit in the classroom. To ensure success, it is also strongly recommended that teachers include guest tribal speakers, if at all possible.

The unit includes many materials that can be used as is or adapted to meet the needs of the specific classroom. Because class time is limited, few teachers will choose to use all of the materials provided. The Section I narrative however, is recommended as the starting point for a basic overview of federal Indian law. From there, a teacher may use the other four narratives, the worksheets, and/or the classroom projects.

The following four books are recommended as important references for the teacher:

Cohen, Felix. *Handbook of Federal Indian Law*. Charlottesville, VA: Bobbs-Merrill, 1982.

Deloria, Vine, Jr. and Clifford M. Lytle. *American Indians, American Justice*. Austin: University of Texas Press, 1983.

Pevar, Stephen L. *The Rights of Indians and Tribes* (An American Civil Liberties Union Handbook). Toronto: Bantam Books, 1983.

Wilkinson, Charles. *American Indians, Time and The Law: Native Societies in a Modern Constitutional Democracy*. New Haven: Yale University Press, 1987.

Current Federal Indian Law and Its Precedents

Teacher Information Sheet

A Note on Word Usage

As you may be aware, the use of the terms "Indian" or "American Indian" stems from an historical misnomer. In past years, other terms have been suggested and used when referring to the native (indigenous) peoples of the Americas in a general, nonspecific way. Such terms have included a "Amerindian," "Native American," "native peoples," and others.

In this unit, I refer to specific tribal group names whenever appropriate. However, I have elected to use "Indian" and "American Indian" when generally referring to native peoples. Although sensitive to the debate regarding the European origins of the terms, they remain the most commonly accepted by native organizations, writers, and individuals. They also tend to have a clearly understood definition for all American people, whereas some of the newer terms have multiple meanings and confusing denotations. In addition, I have chosen to use "American Indian" and "Indian" to remain consistent with the terms used by the Wisconsin Woodland Indian Dissemination Project.

Indian-White Relations: Historical Foundations

Teacher Information Sheet

List of Contacts

Tribal Offices

- Forest County Potawatomi
  P.O. Box 346
  Crandon, Wisconsin 54520

- Wisconsin Bands of Chippewa (Ojibway)

  Bad River Band of Lake Superior Chippewa
  P.O. Box 39
  Odanah, Wisconsin 54861

  Lac Courte Oreilles Band of Lake Superior Chippewa
  P.O. Box 2700
  Hayward, Wisconsin 54843

  Lac du Flambeau Band of Lake Superior Chippewa
  P.O. Box 67
  Lac du Flambeau, Wisconsin 54538

  Red Cliff Band of Lake Superior Chippewa
  P.O. Box 529
  Bayfield, Wisconsin 54814

  St. Croix Tribe
  P.O. Box 287
  Hertel, Wisconsin 54845

  Sokaogon Chippewa (Mole Lake)
  Route 1, Box 625
  Crandon, Wisconsin 54520

- Menominee Indian Tribe
  P.O. Box 397
  Keshena, Wisconsin 54135

- Oneida Tribe of Indians of Wisconsin
  P.O. Box 365
  Oneida, Wisconsin 54155

- Stockbridge-Munsee Band of Mahican
  Route 1
  Bowler, Wisconsin 54416

- Wisconsin Winnebago
  P.O. Box 311
  Tomah, Wisconsin 54660

Narrative I

I. *Sources of Federal Indian Law*

Vine Deloria, a famous Indian activist and lawyer, recently wrote, "The lives of American Indians are interwoven with the federal government." This continued connection amongst tribes, individual Indians, and government offices is the result of laws of Congress, executive powers of presidents, and decisions of the federal courts, including the Supreme Court of the United States. The issues may be as varied as ownership of lands, water and mineral rights, government services, control of funds, criminal jurisdiction (authority), adoption, enforcement of treaty rights, and civil rights, to name just a few. To understand the current state of federal Indian law, one must focus first on the roots and theories of federal responsibility.

Congress

The United States of America formed its first government under the Articles of Confederation during the Revolutionary War. The Articles included a section on Indian affairs which stated that Congress had

> the sole and exclusive right and power of . . . regulating trade and managing affairs with Indians, not members of any of the states, provided that the legislative right of any states within its own limits be not infringed or violated.

This section meant that the individual states retained some powers while Congress exercised others. Tribes residing within a state's claimed boundaries thus were subject to two external Indian policies while still controlling their own internal affairs.

In 1779, Congress adopted a resolution declaring that no Indian land could be transferred except through Congress. The Congress wanted to keep the states and individual settlers from acquiring tribal lands and also to institute a single, national policy on Indian affairs. Congress intended both actions to promote peaceful relations and avoid Indian-white conflicts. However, Congress was ignored, and states and individuals continued to seize tribal territories. From the point of view of Congress, the policies were not working.

The Constitution of the United States, written in 1787 and adopted in 1789, attempted to correct the many problems that were evident with the Articles of Confederation, including the responsibility for Indian affairs. The Constitution gave Congress exclusive power in Indian affairs. Article I, Section 8 of the Constitution granted Congress the power to regulate commerce with Indian tribes. This constitutional clause has been used very broadly since 1789, along with court interpretations and some executive powers (to be discussed shortly). The Constitution also stated that the Senate and the president had the power to approve treaties, including treaties with Indian tribes.

The U.S. Congress believes it has absolute power over Indian affairs. It has used that power both viciously and generously over the past 200 years. For example, Congress has exercised the right to recognize tribes, to provide or withdraw services from the tribe, to promote self-determination, and to withdraw recognition of a tribe. Vine Deloria has stated that

> Indians and Indian Country are virtually at the mercy of Congress . . . . When it comes to federal policy formation, Congress possesses the strength to be a true savior or a dreadful villain depending on the occasion.

In 1978, the Supreme Court again affirmed Congress' power in the case of *U.S. v. Wheeler* by stating: "Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government."

Although Congress has maintained such authority historically, it should be noted that there are many Indian and non-Indian critics of this policy. Some argue that the federal government does not have the right to such control. Others argue that each tribe has maintained its own complete independence. The American Civil Liberties Union has said

> For a number of reasons, Congress may be wrong in presuming it has the right to govern Indians. . . . It is very unlikely, however, the Congress will ever change its position on this matter and the rights of Indians must be viewed from this perspective. The old saying of "might makes right" controls the relationship between Indians and the United States.

As difficult and unfair as this relationship may sound, it is necessary to understand it, as all federal policies—federal Indian law—are based upon this power. However, since the 1970s, Congress has promoted, through federal laws, the self-determination of tribes.

Over the past 200 years, Congress has passed hundreds of laws specifically applying to American Indian peoples and tribes. Some of these laws replaced and changed earlier laws. Others addressed new issues. Like all laws and systems of justice, the federal Indian laws have changed drastically over time. What was law in 1850, for example, was not necessarily law in 1935. Congress has extended the original meaning of the Indian commerce clause for beyond the supervision of trade between tribes and traders and has assumed power over criminal jurisdiction in certain crimes, protection of certain political and civil rights, and the provision of Indian education, among other things.

Federal Courts

Federal responsibility and power over Indian affairs also come from the judicial system of the federal courts. The Supreme Court of the United States began to seriously define the federal government's relationship to Indian nations in the 1820s and 1830s. Through several significant cases during that period, Chief Justice John Marshall developed important legal theories on the relationship between tribes and the federal government. In 1823 the case of *Johnson v. McIntosh* was decided with rather confusing and conflicting theories. The case recognized the ultimate control by the U.S. government of Indian lands while also respecting Indian occupation of the land and tribal autonomy (independence). In 1831 and 1832, two famous cases (*Cherokee Nation v. Georgia* and *Worchester v. Georgia*) developed these ideas in more depth.

From these two cases, one of the most important legal concepts in federal Indian law was pronounced. The legal concept described Indian tribes as "domestic, dependent nations" in a "trust relationship" with the United States government. The cases recognized a unique relationship between the Indian nations and the federal government: Indian nations are sovereign, to some extent, while also under the protection of the federal government.

In general, federal courts have made decisions that support Indian rights and claims. Over the years the Supreme Court has developed a set of rules known as "judicial construction," or the Canons of Treaty Construction, to be applied to cases involving Indian issues. These rules were developed in order to have true justice and to recognize the disadvantages Indians faced in the past when confronted by European powers and the United States. The rules recognized that treaties were often unclear to Indian leaders because of language differences, language barriers, and the fraud of the white officials. Military and political pressures also forced Indian peoples

into an unfair situation. The courts, in understanding the past exploitation of American Indians, have used the following rules to come to fair decisions:

- Ambiguous expressions in treaties must be decided in favor of Indian claims.
- Treaties must be interpreted as Indians would have understood them.
- Treaties must be liberally construed in favor of the Indians.
- Treaties reserve to Indians all rights that have not been granted away. (For more information, see Section IV, Treaties.)

Executive

The president of the United States heads the executive branch of government and also takes a role in Indian affairs. In the past, U.S. presidents have taken a much stronger role than at the present. They were involved in the signing of treaties, of course, but they also made military decisions as commanders-in-chief of the armed forces.

The president uses other powers as well. The president directs different branches of government so he can set the tone and direction for government officials in following through on Indian policy. In addition, presidents have used "executive orders" to address certain Indian issues. Presidents delegate certain duties to other officials of the executive branch, such as the secretary of interior and assistant secretary for Indian affairs. These officials, in turn, are responsible for carrying out the law as it relates to Indian affairs.

Summary

You can see that the roots of federal Indian law go back to the very beginnings of United States history. It is clear from the start that the federal government's relationship to Indian nations and peoples was important to the new United States. It should also be clear that the government-to-government relationship of tribal nations to the U.S. government is unique in American society.

Federal Indian law is complicated, and many changes have occurred over the past 200 years. Some laws have been extremely unjust, while other laws have attempted to promote true justice. Federal Indian law has been developed and enforced by all three branches of government: Congress (legislative branch); federal courts, including the Supreme Court (judicial branch); and the president (executive branch).

Student Worksheet #1

I. *Sources of Federal Indian Law*

Work on the assignments below after you have read Section I.

A. *Definitions*—Each word or phrase listed below has been used in the reading. Explain what it means.

1. jurisdiction:

2. domestic, dependent nation:

3. trust relationship:

4. executive branch:

B. *Questions*—Answer each question briefly.

1. What powers over Indian affairs are given to Congress in the United States Constitution?

2. How do the federal courts, including the Supreme Court, try to provide fairness and justice when cases involve American Indian claims?

3. What duties does the president of the United States have when working on American Indian issues?

Narrative II

II. *Legal Understandings of Indian Country and Indian Tribes*

Indian Country

The term "Indian Country" has been used for a long time in federal Indian law. As far as we can tell, it was first used by Congress in 1790 to describe the territory controlled by various Indian nations. Today it is defined most clearly in federal criminal law. Title 18 of the U.S. Code states that "Indian Country" means

- *all* land within the limits of any Indian reservation (including roads and individually owned property);
- all recognized Indian communities (even when not a reservation); and
- all allotments with Indian title (individual and land holdings).

Crimes committed by Indians within Indian Country generally come under tribal or federal jurisdiction. States typically do not have jurisdiction, although there are several exceptions under federal law (Public Law 280). The concept of Indian Country applies to noncriminal or civil law, too. Therefore, in Indian Country, the tribal or federal law will control such things as the regulation of traffic, marriage and divorce, child custody, the sale of liquor and cigarettes, and many other matters.

The *legal* concept of Indian Country differs from the *traditional* Indian cultural concept of viewing the North American continent as under the spiritual guidance and control of American Indian tribes. Although this cultural view of Indian Country is deeply important for religious and cultural reasons, it is not part of the legal definition. The federal laws that have evolved regarding Indian Country are a result of the political relationship between the federal government and tribal governments.

A number of federal court cases in the last few decades have attempted to clarify the legal understanding of Indian Country. These cases have often included much historical research. The courts have reviewed the details of treaties and the understanding of the treaties by both Indian peoples and government officials at the time they were signed. The courts also have considered the historical intent of Congress regarding a federal Indian law or treaty. A large number of these cases have been resolved in favor of tribes. Others have not. Many of these cases focused on boundary disputes and tribal jurisdiction.

Indian Tribes

There are many different understandings of what constitutes an Indian tribe and who is an Indian. Let's look first at the question of who is an Indian. As you may be aware, this identity question is often a matter of personal and community opinion. For example, one person may have a heritage that includes a Menominee great-grandmother. Thus, this person is one-eighth Menominee. However, he or she may or may not be identified with the Menominee tribe or as an Indian. Much depends upon the way people are raised. Their understanding might vary depending upon their community, their family, and their cultural awareness.

The federal government and tribes use different definitions for different purposes. Some federal laws define an Indian as anyone of Indian descent. Other laws require that a person be one-quarter or one-half Indian to be covered by those laws. In some laws, the definition requires that an Indian be an enrolled member of a federally recognized tribe. The U.S. Census Bureau, on the other hand, counts as an Indian any person who claims to be one.

Each Indian tribe, whether federally recognized or not, has its own requirements for tribal enrollment. Most tribes require one-fourth tribal blood, but others vary and require a greater or lesser amount. A person may be considered an indian for tribal purposes but not for federal purposes. Similarly, a person might be eligible as an Indian under federal law but not eligible for tribal membership.

Just as the definitions of Indian vary, so do the understandings of "tribe." Among Indian people the concept has historical, cultural, religious, economic, and political elements. The heritage and identity of the tribe is extremely important to its members and has an impact upon all aspects of life.

The federal government has a limited guideline for the recognition of Indian tribes. Officially, the federal government recognizes fewer than 300 of the 400 or so tribes that claim to exist. In general, the federal government identifies a "tribe" by the following guidelines:

- a body or group of Indian people of same or similar heritage;
- united in a community under a clear government or leader; and
- inhabiting a particular area or territory.

These guidelines have been confusing and open to interpretation in different ways. Many groups of Indians who consider themselves tribes have not been recognized by the federal government.

In the 1970s a federal review commission on Indian affairs was set up to evaluate, among other issues, the process of federal recognition or acknowledgment of unrecognized tribes. This was in response to the fact that many people concerned about justice and fairness for Indian people had criticized the government's recognition policy as being severe and unfair. In response, Congress delegated to the secretary of the interior (the executive branch) the authority to recognize or acknowledge additional tribes. This acknowledgment process, as it is called, requires that an unrecognized tribe meet several specific requirements to qualify as a recognized tribe. The requirements include:

- written or oral historical evidence shows the group can be recognized as an American Indian tribe;
- membership of the group is composed of persons who are *not* members of another tribe;
- members of the group are descendants of an Indian tribe which historically lived in a specific area, and that members continue to inhabit a specific area distinct from other populations (although the geographic area may have changed over time);
- the group has had a continuous government or leadership throughout its history; and
- the group has not been specifically terminated as a tribe through congressional legislation.

Indian groups not currently recognized as tribes by the federal government must prove they meet the requirements by gathering much evidence. It is a time-consuming project without any guarantee of success.

A tribe, even though unrecognized, can enforce treaties through the courts. An unrecognized tribe may also be considered a tribe by other tribal governments, even though the federal government does not acknowledge its tribal status. In certain instances, members of unrecognized tribes are eligible under some federal laws for legislated programs and services.

As you can see, defining a tribe varies according to one's perspectives and criteria. There is a big difference between the federal government's definition of a tribe and an Indian understanding of a tribe. However, for federal Indian law, it is the U.S. government's recognition of a tribe which provides a basic underpinning of the law. If a tribe is officially recognized by the federal government, it has a government-to-government relationship with the United States. The tribe is recognized as a political unit or a government, similar to state, city, or county governments. Its relationship to the United States is unique because of the nature of Indian-white relationships and the history of tribal relationships with the U.S. government.

Student Worksheet #2

II. *Legal Understandings of Indian Country and Indian Tribes*

Work on the assignments below after you have read Section II.

A. *Definitions*—Each word or phrase listed below has been used in the reading. Explain what it means.

1. criminal law:

2. civil law:

3. federally recognized tribe:

4. unrecognized tribe:

5. enrolled tribal member:

B. *Questions*—Answer each question briefly.

1. What does "Indian Country" mean in federal Indian law?

2. What does "Indian Country" mean from the traditional American Indian view?

3. List several different ways someone might be identified as an American Indian.

4. What are the general guidelines followed by the federal government in recognizing a tribe?

Narrative III

III. *Tribal Governments*

Background

Indian tribes have always had the right to govern themselves. This was true before Europeans conquered and settled North and South America. It was certainly true before the United States of America became an independent nation. No one, including Congress and the president, gave Indian tribes the right or power to govern themselves. The tribes have that power from their own people. The Supreme Court declared that Congress is *not* the creator of tribal power.

Although the tribal right to self-government comes from the people and not from the U.S. Congress, the Supreme Court has upheld the right of Congress to limit or abolish tribal governments. Congress, for example, terminated a number of tribal governments in the 1950s and early 1960s. This meant that there was no longer a government-to-government relationship and that the tribe was no longer seen as a political entity by the federal government. (The tribe, of course, could continue to exist separate from the federal relationship.) Although the federal government's power to abolish tribal governments has been severely criticized, it still remains a principle of federal Indian law.

Congress also has used two broad types of limits on tribal powers. The first type is called an *explicit limitation*. This means that Congress has specifically passed laws prohibiting or limiting tribal powers. Two examples of explicit laws passed by Congress include restricting the sale of reservation land and creating federal jurisdiction over major crimes committed. The second type of limit on tribal power is an *implicit limitation*. The Supreme Court has pointed to the fact that tribal governments lost some powers when they became *domestic, dependent nations*. The loss implicitly limits tribal powers. For example, tribal governments can no longer enter into treaties with foreign nations.

Although these limitations are important and certainly have caused frustrations, tribal governments do retain a great deal of power and authority in regulating tribal activities. Each tribe can determine its own laws regulating the internal affairs of the tribe and the conduct of tribal citizens. In this way, tribal governments are very similar to other governments with which you may be familiar.

Understanding Tribal Power

A good government, whether it be national, state, city, or tribal, is interested in protecting its citizens and promoting the well-being of all. Thus, a good tribal government would be responsible to its citizenry and would act according to the best interests of the community. As you are aware, this is often more difficult than it seems because good people can disagree over what is best for all. Governments sometimes change policies because options change.

Every government has a number of powers which can be divided into several categories. Let's look at several powers of tribal governments. The right to form a government is an important tribal power. As stated before, the power comes from the people. The power includes the right to choose officials and methods of governing. Tribal governments in the United States differ from each other in many ways. They have varied both in the past and in the present. Today most tribes have a written constitution which is the basic law of the group. In addition, most tribes have more detailed codes of law and tribal courts to enforce these laws. Many tribes have branches of government represented by a tribal chairperson (executive), tribal council

(legislative), and tribal court (judicial). However, there are many variations. More than 100 tribes reorganized their governments under the Indian Reorganization Act of 1934 (Wheeler-Howard Act). This act had some positive points but it also has been severely criticized because it requires review and approval of tribal constitutions and laws by the secretary of the interior.

Besides the power to form and choose their own government, tribes have the absolute right to determine their own membership. As mentioned earlier, tribal laws about membership may differ from various federal laws defining an Indian. A tribe's power includes the right to adopt members and to expel members. Each tribe, as mentioned previously, establishes its own rules for tribal enrollment according to "blood quantum" (or fraction of Indian ancestry). In addition, some tribal governments have other requirements such as a current residence on the reservation or a certain number of years of residence on the reservation. A few tribal governments base membership on matrilineal or patrilineal descent. This means that children of a marriage between a tribe member and a nonmember may or may not be eligible for tribal membership. For example, if the tribe were matrilineal, a child would become a member only if his or her mother was a tribal member.

Tribal powers include the right to keep law and order and the right to tax. As with any other governments, these two powers are necessary to provide services and to promote the safety and well-being of citizens. Tribal governments clearly have the right to tax non-Indians within Indian country. Taxes may take various forms such as property taxes and different forms of licensing. Federal courts, including the Supreme Court, have heard many cases regarding the right of Indian tribes to tax non-Indians and have recognized a tribe's power to tax.

The tribal government has the power to maintain law and order. This means that the tribe can pass and enforce laws which regulate civil and criminal matters. The tribe can establish and train a police force and maintain courts and jails.

There are some congressional restrictions on tribal law enforcement. Congress has excluded certain major crimes (through the Major Crimes Act) from tribal jurisdiction. This began approximately 100 years ago when Congress placed several major crimes under federal jurisdiction. There are now 14 crimes excluded from tribal jurisdiction, including murder, kidnapping, and arson. There are many Indian people, including attorneys and tribal leaders, who feel the exclusion of major crimes from tribal jurisdiction interferes with tribal self-government. There is some confusion in the law, and the Supreme Court has not made clear the exact meaning of the law.

Congress has limited tribal law enforcement in two other ways as well. Certain tribes have been placed by Congress under the criminal jurisdiction of *state* governments. These states, and the tribes within, are called "PL 280 states." Public Law 280, which was passed by Congress in 1953, affects only a few states. Wisconsin is a "PL 280 state," but the Menominee tribe is excluded from the legislation.

The Indian Civil Rights Act of 1968 also places limitations on tribal law enforcement. The act limits the penalties tribal courts can impose in criminal cases. It requires that criminal defendants in Indian courts have almost all of the rights that they would have in state or federal courts. Thus, Congress has limited some tribal law enforcement powers through the Major Crimes Act, Public Law 280, and the Civil Rights Act.

In addition to congressional limits, the Supreme Court also has limited tribal law enforcement powers. In the 1978 court case *Oliphant v. Suquamish Indian Tribe*, the court made it very clear that unless Congress had specifically given the power to the tribe, the tribe did not have the

authority to prosecute non-Indians. However, non-Indians committing crimes against Indians in Indian Country are subject to federal jurisdiction.

So far, we have discussed the important powers of tribes in these areas: forming a government, determining membership, the right to tax, and the right to make and enforce laws. Tribal governments also have other powers. Briefly, some of these powers are

- the regulation of tribal property and privately owned property within Indian Country;
- the right to exclude nonmembers from tribal territory (Indian Country);
- the regulation of domestic relations (including marriage, divorce, adoption, and child custody);
- the regulation of business and economic activities;
- the regulation of hunting, trapping, fishing, and gathering and the management of certain water, mineral, and timber rights;
- the regulation of rights reserved by treaty;
- the management of certain federal Indian programs; and
- the management of the government-to-government relationship with the federal government.

It should be clear that tribal governments have many powers. Although there are some congressional limitations and disputed areas of power, tribal government is a potent expression of the self-determination of Indian tribes.

Student Worksheet #3

III. *Tribal Governments*

Work on the assignments below after you have read Section III.

A. *Definitions*—Each word or phrase listed below has been used in the reading. Explain what it means.

1. explicit limitations:

2. implicit limitations:

3. blood quantum:

B. *Questions*—Answer each question briefly.

1. Why is it important for tribal governments to have the power to tax?

2. What are some of the limits Congress has placed upon tribal governments?

3. List some of the powers tribal governments have.

4. From where do tribal governments get their power?

Narrative IV

IV. *Treaties*

A treaty is an agreement or contract between two sovereign nations. Only the federal government may enter into treaties with other nations. The U.S. Constitution specifically details how a treaty between the United States and another nation must be approved. Both the president and two-thirds of the U.S. Senate must approve the treaty before it will be accepted. The treaty then becomes part of the supreme law of the land, to be protected and enforced by the executive branch. The federal courts and the Supreme Court have the ultimate responsibility for interpreting the treaty should a dispute arise. A treaty holds a higher place than a state law—therefore, state laws and actions cannot legally impinge upon treaty agreements.

Treaties were signed between American Indian nations and European nations during the period of European settlement in the Americas. The United States of America continued to enter into treaties with Indian nations until 1871. Indian treaties have addressed a large variety of issues, including trade, boundaries, exchanging land, hunting and fishing, money, settlements, treatment of peoples, and other things.

Treaties between the United States and an Indian nation are a source of confusion and misunderstanding to many Americans today. Some people think that treaties gave certain "rights" to a tribe. In fact, the Supreme Court has stated that Indian treaties are *not* a grant of rights to a tribe. Instead, some of the traditional rights of the tribe are given to the United States in a treaty. The treaties removed some rights that the tribe had held traditionally while guaranteeing certain rights they had always held. The Supreme Court has made clear that any traditional right not specifically canceled by a treaty or a federal law is *reserved* to the tribe. This principle of federal Indian law is called the *reserved rights doctrine*.

Treaties between the United States and Indian nations vary in content and scope. Over 650 Indian treaties were entered into between the founding of the United States and 1871, when Congress declared that treaties would no longer be the method of conducting government relations with Indian tribes. For Indian tribes, some treaties were voluntary while others were not. Many issues have been raised regarding the language used at treaty-making sessions, the cultural differences regarding the meaning of parts of a treaty, and the lack of "good faith" on the part of U.S. officials. The U.S. government does not have a good reputation or a clear record when one looks at the historical facts of treaty-making and the many promises in treaties that have continuously been broken. One point is clear, however. Treaties do provide important legal grounds for Indian nations today as they seek justice in the American court system.

As different as Indian treaties may be from one another, they often contain two common points. First, they usually provide for the transfer of *land* from tribal control to the U.S. government. The U.S. government often negotiated treaties with land as the major issue. Second, treaties generally promised some land to be specifically *reserved* for the tribe's use. Some treaties further specified that certain services or payments were to be provided to the tribe, but others did not. Remember, since a treaty was taking rights away from Indians, it often did not specifically list all of the rights reserved to them. These reserved rights might include the use of water, fishing, hunting, and so forth.

The Supreme Court has developed a set of rules to help interpret Indian treaties because there were so many disputes regarding them. These rules are called the *Canons of Treaty Construction*. There are three basic rules:

- ambiguous expressions in treaties must be decided in favor of the Indians
- treaties must be interpreted as the Indians would have understood them
- treaties must be liberally construed in favor of Indians.

The Supreme Court has recognized that the Indian nations were at a clear disadvantage when the treaties were signed because of the unfair conditions, language misunderstandings, and cultural differences. The Supreme Court believes that because of these unfair circumstances, the tribes should be given the benefit of any doubts regarding treaties. The Court has stated that the United States has a responsibility to avoid taking advantage of the other side.

Many tribes have gone to court to have their treaties enforced, including the enforcement of rights that were reserved to them under the *reserved rights doctrine*, even though such rights were not mentioned in a specific treaty. Tribes can file lawsuits in federal court if state or federal officials are violating treaty rights in some way. They have the right to file for money damages, if appropriate. Although court cases over treaties can be very expensive and lengthy, many cases have been decided fairly and justly in support of the treaty rights of the tribe. Unfortunately, these decisions have been difficult for some non-Indians to understand.

Student Worksheet #4

IV. *Treaties*

Work on the assignments below after you have read Section IV.

A. *Definitions*—Each word or phrase listed below has been used in the reading. Explain what it means.

1. reserved rights doctrine:

2. Canons of Treaty Construction:

B. *Questions*—Answer each question briefly.

1. What is a treaty?

2. Who gives up their rights in a treaty between the United States and an Indian tribe?

3. Why does the Supreme Court believe it is fair and just to favor American Indian tribes in cases involving Indian treaty issues?

Narrative V

V. *Recent Federal Indian Laws*

The relationship between American Indian tribal governments and the U.S. federal government has experienced many low points and few high points over the past 200 years. Since the late 1960s, the trend has been for Indian people, Indian organizations, and tribal governments to be activists in pursuing justice and control over their own future. The recent trend for the U.S. government has generally been one of respect and support for American Indian autonomy. This trend does not mean that there is solid agreement among Indian people and federal officials.

There are many differences of opinion on all sides. For instance, there have been government officials who have recommended "termination" of tribes and "abrogation" (cancellation) of treaties. On the other hand, there have been government officials who have clearly supported a broad interpretation of Indian rights. Within the Indian communities, there have been varied approaches and disagreements over some issues. The future direction of tribal government is often a source of internal disagreement. Noted Indian lawyer and writer Vine Deloria, with others, has questioned how much of "traditional Indian culture and values can survive" if tribal governments continue to develop along Anglo-American lines.

Despite these differences, recent federal legislation has promoted, in some ways, self-determination of tribes and the preservation of American Indian rights. Like all legislation, each law can also be accused of having some flaws or weaknesses. The following paragraphs will describe some of the important federal Indian laws of the recent past.

Indian Civil Rights Act (1968)

This law has been both praised and criticized. It protects certain individual civil rights of Indian peoples within their own tribal communities. These rights include: freedom of speech, religion, press, and assembly as well as protection against unreasonable search and seizure, self-incrimination, cruel and unusual punishment, and double jeopardy. All of these protections are guaranteed to all U.S. citizens through the Constitution. If you will recall, American Indian people hold dual citizenship, as citizens of the U.S. and as citizens of their tribe. The Indian Civil Rights Act requires that tribal governments abide by these protections.

The act is most criticized because it allows federal courts to review and intervene in some tribal matters. The critics of the law note that it was passed in the midst of the turmoil and action of the 1960s. Some people, both Indian and non-Indian, saw the Indian Civil Rights Act as a great advance similar to other important civil rights laws of the period. Critics of the law, however, note that American Indian peoples are different from other racial minorities in the United States in one key way. American Indians, unlike other minority groups, have a government-to-government relationship with the United States. The autonomy or self-determination of tribal governments has been an important goal of American Indian peoples. The Indian Civil Rights Act limits or interferes with the autonomy of tribal government.

Tribal Education Act (1972)

The federal government has a long history of involvement with Indian education dating back to the early 1800s. Unfortunately, the government's approach to Indian education has included a great deal of prejudice, repression, and failure. Since the 1930s, with the passage of the Johnson-O'Malley Act, the federal government has gradually moved away from direct control of Indian education to a system in which tribes control the education of their children by constructing and

administering tribal schools or by becoming involved with the local public schools. At the present time, fewer than 30 percent of Indian children attend the federally-run Indian boarding schools.

The Indian Education Act of 1972 was passed by Congress in response to the conclusions of a congressional subcommittee. This subcommittee, headed first by Senator Robert Kennedy and after his death by Senator Ted Kennedy, wrote of serious problems and failures in their final report of 1969, titled "Indian Education: A National Tragedy—A National Challenge." One section of the report stated:

> We have developed page after page of statistics. These cold figures make a stain on our national conscience, a stain which has spread slowly for hundreds of years. . . . We have concluded that our national policies for educating American Indians are a failure of major proportions. They have not offered Indian children—either in years past or today—an educational opportunity anywhere near equal to that offered the great bulk of American children. Past generations of lawmakers and administrators have failed the American Indian.

The Indian Education Act of 1972 attempted to solve the problems noted in this report. It is now the primary federal program specifically addressing Indian educational needs. Funds are appropriated by Congress to assist with the education of Indian children by supplementing basic programs. Money is also provided for graduate school scholarships and adult education classes.

Indian Self-Determination and Education Assistance Act (1975)

This act has several significant sections, including those parts which focus on education. The education sections include the limited provision of funds for tribes to build schools. The act also directs the secretary of the interior to contract with qualifying tribes if they desire to administer federal programs for the tribal community. The act promotes self-determination rather than direct federal administration of Indian programs.

There are many positive elements in this law. It appears to promise Indian control of federal Indian programs on the tribal level. This element is different from the old federal policy of absolute control through an arm of the Department of Interior known as the Bureau of Indian Affairs (B.I.A.). The older federal policy of absolute control of Indian affairs meant that B.I.A. officials, who often were non-Indians, controlled tribal programs. Through the Indian Self-Determination Act, tribes make the decisions about the involvement and administration of federal programs.

Despite this act, frustrating guidelines and confusing conflicts between tribal administrators and federal officials still exist. Because the law is so new, it is difficult to predict the final outcome. Some criticize the act as being too restrictive, while others complain that it merely restates the Indian Reorganization Act (Wheeler-Howard Act) of 1934. Whatever the final outcome, the Indian Self-Determination and Education Assistance Act of 1975 is certainly a symbolic and practical improvement in federal Indian law. It respects the concept of self-determination for Indian tribes.

Indian Child Welfare Act (1978)

The Indian Child Welfare Act was passed by Congress in response to the concern by Indian communities that American Indian children were being "lost" from the tribe through unfair adoption and child custody standards and practices. The law provides certain safeguards for the tribal government when participating in adoption or foster home placement of Indian children.

The tribal courts, in effect, now have superior jurisdiction to state courts when the proceedings involve tribal children.

The law also sets up a preferred order of adoption of Indian children to maintain the Indian family and to support the continuation of tribal custom and tradition. The order of preferred placement of a child would first be with a member of his or her extended family. This order would include aunts, uncles, cousins, grandparents, and so on. If that is not possible, the second preference would be with other unrelated families belonging to the same tribe. The third preference would be for adoption with an Indian family of another tribe. Only as a last resort would an Indian child be placed with a non-Indian family.

Conclusion

There are many other laws passed by Congress in recent years which address the status of American Indians. In addition, there are sections of other laws which either specifically or generally include American Indians. The laws passed by Congress and applicable to American Indian tribes and peoples cover a large number of issues including health, economic development, housing, social service programs, job training, natural resource management, and legal assistance, to mention just a few.

It should be clear that recent federal Indian laws passed by Congress recognize the unique trust relationship between the federal government and tribal governments. The intent of recent federal laws, imperfect as they may be, has been to support tribal control of the tribal future. The commitment and activism of tribal peoples is also a crucial part of the process.

Student Worksheet #5

V. *Treaties*

Work on the assignments below after you have read Section V.

A. *Definitions*—Each word or phrase listed below has been used in the reading. Explain what it means.

1. civil rights:

2. custody:

3. double jeopardy:

4. self-determination:

B. *Questions*—Answer each question briefly.

1. In general, what have been the recent directions in federal Indian law?

2. From a tribal perspective, what are some of the positive and negative parts of the Indian Civil Rights Act of 1968?

3. Why was the Indian Education Act of 1972 passed by Congress?

4. What is the order of preference for the adoption of Indian children?

Current Federal Indian Law and Its Precedents

Key Concepts

blood quantum – a term used to identify the percentage of tribal heritage. Various federal Indian laws and tribal enrollment requirements typically require a certain minimum percentage of Indian blood. For example, some laws require a 25 percent (one-quarter) blood quantum.

Canons of Treaty Construction – a set of rules developed to guide federal courts in making fair decisions in cases involving Indian treaties. The rules provide for favoring tribes in the cases of ambiguous language. (For specifics, see *Narrative IV: Treaties*)

civil laws – laws dealing with noncriminal matters. For example, adoption procedures are covered under civil law.

criminal law – laws that address wrongdoing; a system of law identifying crimes and their punishments.

custody – to have responsibility for and authority over a person, place, or thing. For example, the children were placed in the custody of their grandparents after their parents died.

domestic, dependent nations – a phrase developed by the Chief Justice of the Supreme Court, John Marshall, in 1831. It described what he saw as the unique political situation of Indian nations within the boundaries of the United States.

double jeopardy – refers to a person being tried twice for the same crime. The U.S. Constitution states, "No person . . . shall . . . be subject for the same offense to be twice put in jeopardy of life or limb."

dual citizenship – belonging to two nations; having citizenship rights and responsibilities within two nations. For Indian peoples in the United States, dual citizenship means that they are both American citizens and tribal citizens (members).

enrolled member – a person who is accepted and recognized as a member of a tribe. The enrolled member is considered listed on the tribal "rolls."

executive branch – the branch of government having the power and duty to see that the laws are enforced and administered; in the United States, the president heads the executive branch and is sometimes called the chief executive.

executive order – a direction or order from the president of the United States. For example, President Ulysses Grant established a reservation for the Mescalero Apaches through an executive order in 1873.

explicit limitation – specific limits placed upon the power or authority of tribal governments through laws passed by the U.S. Congress. For example, the Major Crimes Act lists explicit limitations on tribal governments with regard to criminal law.

federally recognized tribe – a tribe which the federal government has acknowledged and, therefore, conducts a government-to-government relationship with. For example, the Stockbridge-Munsee Band of Mahican is a federally recognized tribe.

foster home – a temporary home for a child.

implicit limitations – those limits believed to be placed upon tribal governments by their status as "domestic, dependent nations," and thus no longer completely sovereign. This includes a limitation on their power to sign treaties with other nations. Many implicit limitations are questioned by tribal leaders and activists.

Indian Country – in broad legal terms, it refers to all land controlled by Indian claims: reservations, Indian communities, and individual allotments. (For specifics, see *Narrative II: Understandings of Indian Country and Indian Tribes*)

judicial systems – a part of government responsible for seeing that laws are carried through justly; a system of justice; judges; law courts and their duties; interpreters of the law.

jurisdiction – the limit or area of one's authority. For example, tribal courts have jurisdiction over many civil matters.

plenary authority – full or complete power.

reserved rights doctrine – the legal doctrine which states that all traditional rights of a tribe not specifically canceled by a treaty are kept (reserved) by the tribe.

self-determination – to make decisions about yourself; to run your own affairs. Self-determination of the American Indian tribes recognizes that it is the tribes' duty and right to govern and make decisions regarding tribal members.

self-incrimination – to provide information which might appear to link you to a crime. In the United States, the Fifth Amendment of the Constitution protects us from having to reveal such information.

termination – a U.S. policy of the 1950s and early 1960s to end tribal government and the government-to-government relationship between tribes and the U.S. federal government.

trust relationship – a term used to define the unique government-to-government relationship between the U.S. government and federally recognized tribes. The relationship includes a "trust" in the promises made through treaties.

unrecognized tribe – a tribal group not accepted or acknowledged as a tribe by the federal government. Therefore, they do not have a government-to-government relationship. For example, the Brotherton Tribe of Wisconsin is an unrecognized tribe.

Current Federal Indian Law and Its Precedents

Suggested Classroom Projects (Individual or Group)

1. Choose one (or more) of the Wisconsin Indian tribes and learn about its present government. Collect information, including copies of governing documents. If possible, invite one or several tribal leaders into the classroom to discuss their government. Have students prepare a list of questions for the speakers prior to the discussion.

2. Have students "establish" a mock tribal government. Be sure to direct them to the major issues: the form the government will take, the determination of membership, and the powers of government. A brief constitution could be developed to include the major points of governance.

3. Compare a tribal government with the national government. Have students look at the *responsibilities* of both governments, in the broadest sense. Develop a chart which would note possible similarities and differences. (It would be best if you could compare actual governments. For example, the United States and the Oneida Tribe.)

4. Learning about tribal governments should make students more aware of the role of governments in general. With this in mind, a directed discussion could develop regarding the key points of a government and good leaders in any society. The discussion could also focus on what it means to be a good citizen.

5. Hold an oral or written debate in which students take opposing points of view on the following:

   - Can a tribal nation issue passports?
   - Can a tribal nation refuse the federal government's right to draft young people for military service?
   - Can a tribal court have jurisdiction in a custody case between two parents, one of whom is a tribal member while the other is a non-Indian?
   - If a state road runs through a reservation, can the tribal government refuse to allow the state to enlarge the road?
   - Can the tribal government refuse to allow state or federal law enforcement officials on the reservation if these officials are pursuing a non-Indian criminal believed to be hiding in "Indian Country?"

   Other questions can be formulated as well. Encourage students to develop as many reasons as possible regarding both sides of each question.

6. Have students collect and study information on the Wisconsin Ojibway treaty rights situation. Encourage them to understand the complexities of the situation in light of the general information presented in this unit and the specifics of the court cases. Students should then be directed to write an essay on the subject.

7. Establish a mock court case involving the *reserved rights doctrine*. Imagine that a nineteenth century treaty did *not* address the hunting, fishing, and harvesting (rice) rights of the tribe. The tribe is now seeking justice from the courts because state agencies have arrested tribal members who were hunting "off-season" in a state forest. Have students participate by playing different roles: judge, attorneys (representing the state and the tribe), tribal members, state law enforcement agencies, witnesses (for both sides), and so forth. The students should be particularly careful in following the understandings of federal Indian law.

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